The Hays Corporation *and* Jeff Wesley *and* Billy Ray Spencley. Cases 10–CA–30759, 10–CA–30759–2, and 10–CA–30759–3

May 22, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On July 22, 1998, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief to the Respondent's exceptions. The Respondent filed a brief in reply to the General Counsel's brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as set forth below and to adopt the recommended Order as modified.[2]

The Respondent has excepted to the judge's findings that it violated Section 8(a)(3) and (1) of the Act by unlawfully discharging employees Jeff Wesley and Billy Ray Spencley because of their union and protected concerted activities.[3] As discussed below, we agree with the judge's conclusion.

On December 16, 1997,[4] the Respondent, a construction contractor, hired Jeff Wesley and Billy Ray Spencley to work at an industrial jobsite in Decatur, Alabama, known as the Bunge Project. On January 7, 1998,[5] Union Organizer Bobby Drane visited the jobsite during a torrential rain. Drane submitted an application for employment and spoke to employees about the benefits of unionizing, including guaranteed onsite hand washing facilities and the right to "rain out," or take the day off when weather threatened the safety of the work area. Drane suggested employees visit the union hall and apply for membership. Shortly after Drane left the jobsite, the Respondent offered the employees the right to rain out for the day. Wesley and Spencley accepted the opportunity and went straight to the union hall. They applied for membership and were given various items such as hats and stickers embossed with the union logo.

On January 8, the Respondent held a safety meeting at the jobsite at which General Foreman Richard Morris and Foreman James Keys were present.[6] Wesley and Spencley complained about working conditions, including the lack of hand washing facilities and drinking water. Morris responded that he had worked at a lot of jobs where there was no place to eat or wash hands and that if Wesley did not like it he could "go somewhere else to work" or "hit the road." Spencley then stated that OSHA required that the Respondent provide drinking water, a hand washing station, and a clean sanitary eating spot.

The following day, January 9, Wesley "brassed out"[7] and went to lunch. When he returned from lunch, Keys told Wesley to report to Project Superintendent Passmore. Passmore told Wesley that it did not appear that he wanted to abide by the Company's policies and that he was discharged. The Respondent's stated reasons for the discharge included Wesley's poor attendance and his

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to conform to his findings.

[3] There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by threatening Wesley with discharge at the January 8, 1998 safety meeting; by threatening Spencley with discharge on or about January 17, 1998; by creating the impression of surveillance; by telling employees that it would be futile to select a bargaining representative; by telling employees that discussing the Union would violate a company rule; and by telling employees at the January 12, 1998 safety meeting that the company was nonunion and didn't want "to hear any Union bullshit" on the job. There are also no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(3) of the Act by issuing a verbal warning and a first written warning to Spencley on January 16, 1998, and by issuing a second written warning to Spencley on January 20, 1998.

[4] The judge's decision incorrectly states that Wesley and Spencley were hired in 1998.

[5] All dates are in 1998 unless otherwise indicated.

[6] It is undisputed that Morris and Keys as well as Corporate Safety Director Jeffrey Bordreaux and Project Superintendent Wayne Passmore are supervisors within the meaning of Sec. 2(11) and agents within the meaning of Sec. 2 (13) of the Act.

[7] Under the Respondent's "brassing" policy, which was put in place in December 1997, at the beginning of the project, each employee was issued a numbered brass tag when he arrived at the jobsite in the morning. This "brass" identified the employee's whereabouts throughout the day. If the employee left the jobsite for any reason, he would return the brass to the check-in area, or brass area, where the brass would be hung on the brass board. If the employee were onsite, his brass would not be on the brass board. Thus, contractors could look at the brass board and know immediately which employees were onsite. In the event of an explosion or fire, safety personnel could quickly ascertain if all employees were accounted for.

Starting on or about January 5, the Respondent instituted a practice requiring employees to write down the times they left for lunch and returned on a sign-in sheet. Although the Respondent contends that employees were required to complete an "early out" form when leaving for lunch, it produced no documentary evidence to support this contention.

failure to get a supervisor's permission before leaving the jobsite at lunchtime.

On January 12, Morris and Passmore held a safety meeting with the employees. During the meeting, Morris stated that he understood that some of the employees had been to the union hall, that "this is a non-union company" and that he did not want "to hear anymore union bullshit on this job."[8]

On January 16, Spencley was instructed by Keys to go to other job trailers on the Bunge project in search of a particular type of bolt needed to secure an agitator. After Spencley returned, Keys told him that Morris had issued him a written warning for being out of his work area. When Spencley reminded Keys that he had directed Spencley to leave his work area, Keys responded, "I know, I know . . . this ain't me, . . . I didn't write it." Spencley met with Morris and attempted to explain, but Morris responded "I don't care. I'm writing you up."

Sometime around January 17 or 18, Keys called Spencley away from his work area and told him "You know they're gunning for you," and that they finally "got rid of Jeff [Wesley]." Keys stated that Morris was "gunning" for Spencley more than Passmore was gunning for him, that Spencley was a troublemaker and that the Respondent wanted him off the job. Keys also stated that management was "mad about the thing with the Union."

On January 20, Jerry Boudreaux, the Respondent's corporate safety director, visited the worksite and asked Spencley some questions about the job. Boudreaux initiated the conversation, which took place in plain view of Passmore. After the conversation ended, Morris issued Spencley a second written warning for "Leaving Workplace Without Supervisor's Authorization, out of work area talking."

On January 23, Spencley and employees Tony Tippett and Spencer Cary violated the Respondent's hardhat policy[9] by writing the words "HA HA" over the Respondent's name "HAYS" on the hardhat. Passmore issued Cary a verbal warning and Tippett quit the job before any disciplinary action could be taken against him. Spencley, however, was discharged.

Applying *Wright Line,*[10] the judge found, and we agree, that Wesley's and Spencley's union and protected activities were the motivating factors in the Respondent's decision to discharge them. Under *Wright Line* the General Counsel must show by a preponderance of the evidence that the protected conduct was a substantial or motivating factor in the employer's decision. The General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated antiunion animus. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399 (1983).

Here, the judge found, and we agree, that the motivating factor for Wesley and Spencley's discharges was directly related to their engaging in protected activity and their involvement with the Union. Thus, the credited testimony establishes that Wesley and Spencley went to the union hall because of their concern over poor working conditions, they filled out applications for membership, and they raised their concerns about the lack of drinking water and hand washing facilities to the Respondent at the January 8th safety meeting. The credited testimony also establishes that the Respondent knew of their union or protected activity. Wesley and Spencley complained about working conditions to Morris. Morris told employees that he knew that some of them had been to the union hall. Wesley placed a union sticker on his lunchbox, which he carried at work.[11] To the extent that the Respondent contends that only Passmore had the authority to discharge Wesley and Spencley, and he did not know of their protected activities, this claim has no merit. Thus, Passmore was at the January 8 meeting at which Wesley and Spencley complained about working conditions. Further, Passmore consulted with Morris and Keys before taking any disciplinary action.[12] Morris' union animus and hostility towards anyone who complained about working conditions was patent. Thus, while Passmore had the final discharge decision, in these circumstances, Morris' unlawful motivation would be imputed to Passmore.[13]

With regard to the Respondent's antiunion animus, the judge found that the Respondent threatened employees

[8] The judge found that Morris made a similar comment to job applicant Brown Shearer on the telephone. Although that statement was not alleged as a violation in the complaint the judge found it to be evidence of the Respondent's animus.

[9] The Respondent's written policy as to hardhats stated that "Hays employees shall wear hardhats issued by Hays with the Hays logo" and "Hardhats and suspension systems are not allowed to be altered or painted."

[10] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[11] The judge found that Wesley placed a union sticker on his lunch box and that in all likelihood the Respondent knew about it. The Respondent did not except to this finding.

[12] Passmore testified that he spoke to Morris and Keys approximately 30 to 40 times a day. Passmore also testified that he had known Morris for 18 years, had "raised Morris from "bottom helper" to supervisor, that he brought him in as general foreman on the Bunge Project and had frequently brought him in on jobs in the past.

[13] *Springfield Air Center*, 311 NLRB 1151 (1993).

with discharge for engaging in protected activities, created an impression of surveillance, promulgated a work rule prohibiting discussion of the Union on the jobsite, and told employees that their efforts to organize would be futile. The judge also credited Spencley's testimony that Keys told him that the Respondent was "gunning" for him because of his union activities and that Wesley had been discharged for being a "troublemaker." As noted, supra, no exceptions were filed to these findings.

Thus, we find that the General Counsel has met his *Wright Line* burden by showing that the Respondent had union animus and was hostile towards anyone who complained about working conditions; that the Respondent was clearly aware that Wesley and Spencley engaged in protected concerted and union activity; and that the timing of the discharges was proximate to those activities.

We further find that the judge properly rejected the Respondent's defenses that Wesley and Spencley were discharged because of their poor attendance and work records and their failure to adhere to company policies, and not because of their protected or union activities.

As to Wesley, the termination form issued to him on January 9 does not refer to Wesley's absentee record. Rather, it states that the reason for the discharge was that Wesley left the jobsite without proper authorization and was "given instructions as to proper procedure for leaving the job site at any time. Complete disregard for job policy's (sic)." The judge found that the Respondent failed to establish that the early out policy was uniformly enforced at the relevant time. Although Passmore testified that the seven other employees who left the worksite during the scheduled lunchbreak on January 9 signed early out forms, the Respondent failed to introduce these forms into evidence. We find that the Respondent's failure to produce these early out forms and the absence of evidence to corroborate Passmore's testimony as to the "early out" requirement during scheduled lunchbreaks undermines the Respondent's claim that Wesley was discharged for failing to complete an "early out/late arrival" form during his January 9 lunchbreak. Further, Spencley credibly testified that at his January 17 or 18 meeting with Keys, Keys commented that "[t]hey finally got rid of [Wesley]." Keys' comment was made in the context of his warning that Morris was "gunning for" Spencley because Spencley was a union supporter.

With regard to Spencley, the Respondent contends that it discharged him not only because he defaced company property in violation of its rules and showed no remorse for this, but also because of his poor work habits and past absences. While Spencley did deface his hardhat, a second employee, Cary, who committed the same conduct, received only mild disciplinary action.[14] As for Spencley's asserted absentee problem, the Respondent neither issued warnings to Spencley for absenteeism nor informed him that it was a serious problem. Further, Passmore claimed he discharged Spencley instead of using a less severe form of discipline because of Spencley's prior disciplines; however, three of these warnings have been found unlawful. It is well settled that, where a respondent disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful.[15] Finally, in referring to the unlawful warning of January 20, Passmore stated that he had observed the conversation between Spencley and Boudreaux and that he initiated the process that resulted in Spencley's written warning. We agree with the judge that it was unlikely that Passmore would discipline Spencley for leaving his job to talk to one of the Respondent's managers unless the Respondent was looking for a way of getting rid of Spencley because of his protected activity.

Accordingly, we find that the Respondent has failed to rebut the General Counsel's evidence that the Wesley and Spencley discharges were motivated by their protected activities. Spencley's disparate treatment, the unlawful warnings, and the timing of the discharge, together with the Respondent's demonstrated union animus and Wesley's discharge, all lead us to conclude that Spencley was discharged because of his support for the Union and his other protected activities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Hays Corporation, Decatur, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 1(c).

"(c) Informing employees that management did not 'want to hear any Union bullshit on the this job' or otherwise promulgating rules prohibiting them from discussing the Union at the jobsite."

2. Add the following as paragraphs 2(c) and (d), and reletter the remaining paragraphs.

"(c) Make Billy Ray Spencley and William Jeffrey Wesley whole for any loss of earnings and other benefits

[14] The third employee, Tippett, abandoned the job before any action could be taken against him, but there is no evidence he would have been discharged had he remained on the job.

[15] *Jennie-O-Foods, Inc.,* 301 NLRB 305,318 (1991); *Asociacion Hospital del Maestro*, 283 NLRB 419, 425 (1987), enfd. 842 F.2d 575 (1st Cir. 1988).

resulting from their discharges, less any net interim earnings, plus interest.

"(d) Within 14 days from the date of the Board's Order, remove from our files any references to the discharges of Spencley and Wesley, and, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to discharge employees for engaging in union activities or other concerted activities for their mutual aid and protection.

WE WILL NOT create an impression among our employees that their union activities are under surveillance.

WE WILL NOT issue any rule prohibiting or discouraging our employees from discussing the Union at the jobsite.

WE WILL NOT inform our employees that it would be futile for them to select the Union as their bargaining representative.

WE WILL NOT convey to our employees that we intend to discharge employees for engaging in union activities.

WE WILL NOT issue oral or written warning to employees because they engaged in union activities and/or to discourage employees from engaging in union activities.

WE WILL NOT discharge employees because they engaged in union activities or other protected, concerted activities and/or to discourage employees from engaging in such activities or becoming members of a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the oral and written warnings we issued on January 16 and 20, 1998, to our employee Billy Ray Spencley and remove all references to them from our files.

WE WILL, within 14 days from the date of the Board's Order, offer Billy Ray Spencley and William Jeffrey Wesley full reinstatement to their former positions, or to substantially equivalent positions if their former position are no longer available, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Billy Ray Spencley and William Jeffrey Wesley whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the discharges of Spencley and Wesley, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

THE HAYS CORPORATION

John Doyle Jr., Esq., for the General Counsel.
Michael P. Davis, Esq. (Shapiro, Fussell, Wedge, Smotherman, & Martin), of Atlanta, Georgia, for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on June 8, 1998, in Birmingham, Alabama. After the parties rested, I heard oral argument, and on the same date, issued a Bench Decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision. The remedy, Order, and notice provisions are set forth [1]below.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectu-

[1] The complaint identifies the Charging Party in Case 10–CA–30759–1 as Jeff Wesley. His complete name is William Jeffrey Wesley.

References in the transcript to "Bobby Drain" are to Bobby Ray Drane. I order the transcript corrected to reflect the proper spelling of his name, and further order it corrected in accordance with app. C (omitted from publication) to this Certification.

ate the policies of the Act, including posting the notice to employees attached hereto as "Appendix B."

The complaint alleges that Respondent promulgated two rules which interfered with, restrained, and coerced employees in the exercise of their Section 7 rights. Complaint paragraph 9 alleges, and I have found, that on about January 12, 1998, the Respondent, by General Foreman Richard Morris, promulgated the following work rule: "I don't want to hear any Union bullshit on this job." As stated in the attached Bench Decision, I find that this rule violates Section 8(a)(1) of the Act.

Complaint paragraph 12 alleges that on or about January 23, 1998, Respondent promulgated and maintained a rule that employees may not wear hardhats bearing stickers or writing placed on such hardhats after the hardhats had been distributed to the employees. The record does not establish that Respondent maintained any rule which selectively prohibited employees from displaying union stickers or insignia on the hardhats issued to them by the Respondent.

Respondent had a longstanding rule requiring its employees to wear hardhats bearing its logo. The record also indicates that Respondent required an employee's hardhat to display a sticker showing that the employee had completed a safety orientation. However, the credited evidence does not establish that Respondent announced or enforced any rule which precluded employees from wearing union stickers on other parts of their hardhats.[2] Because the record does not prove the violation alleged in complaint paragraph 12, it will not be included in the Remedy.

The Respondent unlawfully issued a verbal and written warning to Spencley on January 16 and 20, 1998, and unlawfully discharged him on January 23, 1998. To remedy these violations, Respondent must rescind the warnings and expunge all references to them from its files. Additionally, Respondent unlawfully discharged Wesley. Therefore, it must offer Spencley and Wesley immediate and full reinstatement to their former jobs, or if these positions are not available, to substantially equivalent positions, and make them whole, with interest, for all losses which they suffered because of the Respondent's unlawful discrimination against them.[3]

On the findings of fact and conclusions of law here, and on the entire record in this case, I issue the following recommended[4]

ORDER

The Respondent, The Hays Corporation, Decatur, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees for engaging in union activities or other protected concerted activities for their mutual aid and protection.

(b) Creating an impression among its employees that their union activities were under surveillance.

(c) Informing employees that management did not "want to hear any Union bullshit on this job" or otherwise promulgating rules prohibiting them from discussing the Union at the job site or from displaying union insignia on their hardhats.

(d) Informing employees that it would be futile for them to select the Union as their bargaining representative.

(e) Conveying to employees that it intended to discharge certain employees for engaging in union activities.

(f) Issuing oral or written warnings to employees because they engaged in union activities and/or to discourage employees from engaging in union activities.

(g) Discharging employees because they engaged in union activities or other protected, concerted activities and/or to discourage employees from engaging in such activities or becoming members of a labor organization.

(h) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the oral and written warnings it issued on January 16 and 20, 1998, to its employee, Billy Ray Spencley, and expunge all references to them from its files.

(b) Offer Billy Ray Spencley and William Jeffrey Wesley immediate and full reinstatement to their former positions, or to substantially equivalent positions of their former positions are no longer available, and make them whole, with interest, for all losses they suffered because of Respondent's unlawful discrimination against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region,[5] post at its facility in Decatur, Alabama, and at all other places where notices customarily are posted, copies of the attached notice

[2] Based on the credited testimony of Wayne Passmore (Tr. 303), I find that Respondent did not prohibit its employees from placing stickers on their hardhats so long as the stickers did not cover the logo or other emblems which needed to be seen for safety or accounting purposes. The record does not establish any instance of an employee placing a union sticker on a hardhat and receiving a warning or other discipline because of it.

The Respondent did discipline employees who defaced the logo by changing the name "Hays" to "HaHa" and, as stated in the Bench Decision, the Respondent disciplined a union adherent more severely. Singling out the union adherent for more stringent discipline clearly violated Sec. 8(a)(1) and (3), but it does not follow either that defacing the logo constituted protected activity or that the Respondent could not apply discipline in a lawful and evenhanded manner to employees who defaced the logo. Clearly, Respondent has a legitimate business interest in maintaining the appearance of its logo and in assuring that certain other emblems on the hardhat remain visible.

[3] Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] See *Indian Hills Care Center*, 321 NLRB 144 (1996).

marked "Appendix B."[6] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 1995. See *Excel Container, Inc.*, 325 NLRB 17 (1997), modifying *Indian Hills Care Center*, 321 NLRB 144 (1996).

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

BENCH DECISION

[Errors in the transcript have been noted and corrected.]

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1998 the so-called I don't want to hear any more of this Union bullshit on the job by Mr. Morris, you heard Mr. Passmore testify that he heard no such comment. You also heard Mr. Passmore testify that never once on the job did he see people wearing any kind of Union insignias, logos and so forth, nor did he hear any statements by anyone, whether it be supervisors or line employees, that there was any type of an issue or an interest over Union involvement on the Bungie project.

In conclusion, Your Honor, what we have here is voluminous documentation that this Company, Hays, implemented neutral rules and applied them fairly, consistently across the board and showed no anti-Union animus in the discharge of Messrs. Wesley and Spencley. What we do leave is evidence of greed, the interest of obtaining money for nothing, and that's what this case is about.

Thank you, Your Honor.

JUDGE LOCKE: Thank you both very much. It is now 8:49, and so to make a realistic estimate it's going to take me about an hour, so we will resume at 9:45 and I will issue a bench decision at that time. So, we'll be off the record until 9:45.

(OFF THE RECORD)

D E C I S I O N

JUDGE LOCKE: This is a bench decision in the case of The Hays Corporation, Respondent, and Jeff Wesley, an individual, and Billy Ray Spencley, an individual, Cases 10–CA–30759–1, 10–

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CA–30759–2, and 10–CA–30759–3. It is issued pursuant to Section 102.35, subparagraph 10, and Section 102.45 of the Board's Rules and Regulations. These cases were consolidated for hearing. On May 5th, 1998, the Regional Director for Region 10 of the National Labor Relations Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing which I will refer to as the Complaint. I conducted the hearing on June 8, 1998 in Birmingham, Alabama.

Respondent has admitted in its Answer the allegations raised in paragraphs 1, 2, 3 and 4 of the General Counsel's Complaint. Based upon those admissions and the record as a whole, I make the following findings of fact:

The charging case 10-CA-3075--1 was filed by Charging Party Wesley on January 22, 1998, and a copy was served by regular mail upon the Respondent upon the same date. The charging case 10-CA-30759-2 was filed by Charging Party Spencley on February 26, 1998, and a copy was served by regular mail upon Respondent on March 6, 1998. The charging case 10-CA-30759-3 was filed by Charging Party Spencley on April 13, 1998, and a copy was served by regular mail upon Respondent on the same date. At all times material to this case, Respondent has been a Georgia corporation with an office and place of business in Decatur, Georgia. During the 12 months before the Complaint issued, the Respondent provided mechanical contractor services on commercial and industrial construction projects valued in

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excess of $50,000.00 directly to customers located outside the State of Alabama. Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent has also admitted, and I find, that the following individuals are supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Corporate Safety Director, Jerry Bordreaux; Project Superintendent, Wayne Passmore; General Foreman, Richard Morris; and Foreman, James Keys.

Respondent has admitted the allegations in paragraph 14 of the Complaint that on or about January 9, 1998 it discharged its employee, Jeff Wesley. I find that it did terminate the employment of William Jeffrey Wesley on that date.

Respondent has admitted the allegations in paragraphs 15 (a) thru 15 (d) of the Complaint. I find that on January 16, 1998, Respondent issued a second verbal warning and a first written warning to its employee, Billy Ray Spencley. Additionally, in accordance with the Respondent's admissions, I find that on January 20, 1998, it issued a second warning – second written warning to Spencley and discharged him on January 23, 1998.

Respondent's Answer did not admit the allegations in Paragraph 5 of the Act that Plumbers and Steamfitters Local Union 377 has been at all—times herein a labor organization

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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within the meaning of Section 2(5) of the Act. Based upon the credited testimony of Bobby Ray Drane, an organizer for Local 377, I find that it is such a labor organization and will refer to it in this decision as the Union.

Respondent has denied the other allegations in the Complaint. Based upon the evidence received at the hearing, I make the following findings:

On or about December 16, 1998, the Respondent hired Billy Ray Spencley and William Jeffrey Wesley to work at a construction site called the Bungie Project. Although Respondent hired Spencley as a pipefitter he did a variety of construction work while employed on this project. Wesley is a pipe welder. On or about January 7, 1998, Spencley and Wesley went to the Union Hall where they met with an organizer, Bobby Drane, and other Union officials. They applied for membership in the Union and obtained various items such as hats and stickers which bore the Union insignia.

At a safety meeting the next day, Wesley complained to general foreman, Richard Morris, and foreman, James Keys, about not having adequate facilities to wash up and to eat. Spencley testified that Morris replied that he had worked a lot of jobs lacking such facilities and that it Wesley didn't like it he should go somewhere else to work. Morris did not testify. Crediting Spencley's—I'm sorry, crediting Spencley's uncontradicted testimony, I find that Morris made this comment.

Before proceeding further, I will address Respondent's

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argument that no adverse inference should be drawn from the failure of Morris and Keys to testify because these witnesses are engaged in the construction industry, work over a wide geographical area, and are hard to locate. It may be noted that under the Board's rules the Respondent is entitled to use the Board's subpoena process which has nationwide jurisdiction to compel the appearance of witnesses. The record does not indicate whether Respondent attempted to subpoena its former supervisors to testify. However, a distinction may be drawn between drawing an adverse inference from the witness's failure to testify and simply crediting the uncontradicted testimony of a witness who did testify. I recognize that the Board is not bound to accept as credible testimony—to accept as credible testimony that is uncontradicted. However, I would be reluctant to reject uncontradicted testimony in the absence of some clear indication that the testimony is faulty. The record does not present any obvious reason to doubt the uncontradicted testimony which I credit here.

Spencley also testified without contradiction that at this meeting he then said that OSHA had certain requirements. I find that the actions of Wesley and Spencley at this meeting were concerted activities concerning terms and conditions of employment and were protected by the National Labor Relations Act. I further find that the Respondent was aware of these activities because Spencley and Wesley made these statements in

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the presence of Respondent's admitted supervisors.

Wesley testified that he did contact the Occupational Safety and Health Administration, or OSHA, about these working conditions. His testimony is consistent with the January 13, 1998 letter from OSHA to the Respondent in evidence as Respondent's Exhibit 10. I find that Wesley did contact this Federal agency and that this action in these circumstances also constituted protected and concerted activity. I do not find that the Respondent knew that Wesley had made such a contact at the time Respondent discharged Wesley. On that date, January 9, 1998, Respondent had not yet received the letter from OSHA. However, Respondent did know of Wesley's protected activity speaking out at the safety meeting on January 8th, 1998. Wesley credibly testified that he had placed a Union sticker on his lunch box. I find that in all likelihood Respondent also was aware of this Union sticker.

At noon on January 9, 1998, Wesley went to lunch. Before leaving the jobsite he turned in the brass coin or medallion which had his employer—or rather had his employee number on it. He turned it in to the secretary in the Respondent's trailer office. When he returned from lunch, foreman Keys told Wesley to see project superintendent Passmore. Wesley testified that Passmore told him that it did not appear that Wesley wanted to abide by Company policies or be part of the Company and discharged him. Although the discharge is not in dispute, the motivation

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for it is.

Respondent contends that it discharged Wesley for infractions which include poor attendance, which Wesley admitted, and for failing to abide by its policy of getting a supervisor's permission before leaving the jobsite. Before addressing this issue, it is necessary to consider other evidence concerning motivation.

Spencley testified that after Wesley's discharge he had a conversation with foreman Keys in a building at the jobsite. No one else was present when Keys called Spencley over. According to Spencley, Keys said, "You know they're gunning for you," adding, "I got rid of Jeff." By Jeff, I conclude that Keys was referring to Wesley. Keys added that Richard Morris, the general foreman, was "gunning for" Spencley more than Wayne Passmore was gunning for him. Passmore was the project superintendent, and Keys explained that Richard Morris was gunning for him because Spencley was a trouble maker and they wanted to take him off the job. According to Spencley, Keys said that management was mad at Spencley because of the Union insignia which he wore.

Keys did not testify, and I credit Spencley's uncontradicted testimony for the reasons I discussed above. I further find that Keys' statements violate Section 8(a)(1) of the Act as alleged in paragraph 7 and 17 of the Complaint. Spencley also testified that after Wesley's discharge there was

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a meeting at which Passmore and general foreman Morris spoke. According to Spenciey, Passmore said that Wesley had been terminated because "he did not want to be a team player. That's how Hays Corporation deals with people who don't want to be team players." Spencley further testified that Morris

said, "I understand some of you have been up to the Union Hall. This is a non-Union company and I hope there will be no Union bullshit". Although Morris did not testify, Passmore denied hearing Morris make any comment about Union bullshit. Although I credit Passmore's testimony that he did not hear the "Union bullshit" comment, nonetheless I find that Morris said it. Before I explain my reasoning hers, I wish to discuss the credibility of Passmore as a witness.

Passmore impressed me as a reliable witness and he certainly was a disinterested one. If anything, he might be expected to testify adversely to the Respondent which had discharged him from the position of project superintendent in March, 1998. Based on his demeanor. Spencley also impressed me as being truthful. Additionally, Spencley did not seem to exaggerate to make his case appear stronger. Since both he and Passmore presented as highly believable witnesses, resolving the conflicts presented by their testimony is difficult. I do so based on the interest which each of these witnesses had in the outcome of this proceeding. Spencley had more to gain from the outcome of this proceeding than did Passmore. Based upon

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that criterion, I credit Passmore.

Additionally, I might note that Spencley further testified that on the day Passmore discharged him, Passmore took Spencley's hard hat bearing the Union sticker, hit it on the floor, told Spencley that he was fired, and made a comment about "Union bullshit." Those actions seem quite out of keeping with Passmore's temperament as displayed on the witness stand. I realize, of course, that Passmore was under a lot of stress at this point in his career, and eventually his employment with Hays Corporation was terminated. But even so, it seems a bit unlikely that he would express himself so dramatically as Spencley testified. So, I find that Passmore did not make the comments attributed to him by Spencley at Spencley's termination interview.

However, returning to the earlier meeting at which Passmore and Morris both were present, I do find that Passmore made the comment not—I'm sorry, I do find that Morris made the comment which was not heard by Passmore that he did not want to hear any "Union bullshit" on the job.

Another witness, job applicant Brown Shearer, testified that Morris made a comment about "Union bullshit" when Shearer spoke with him by telephone. I credit Shearer's uncontradicted testimony and having found that Morris made the comment once in his telephone call with Shearer, I believe it is likely that

Morris made it twice, namely that lie also made it during the

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meeting at which Passmore was also present. I, therefore, find that he made the comment at the meting described by Spencley.

Getting back for a moment to the job -to the telephone conversation which job applicant Shearer had with Morris, certainly as a job applicant Shearer enjoys the rights of an employee under the Act. Therefore, I would conclude that if the comment made by Morris about Union bullshit had been alleged in the Complaint, it would have been found to be violative. However, the remedy for such a comment would be the same as the remedy for the Section 8(a)(1) violations alleged in the Complaint and established in this case. Therefore, the addition of such a violation would be cumulative. I will not add the violation for that reason, but I will consider it, however, as evidence of motive. And, as noted above, I also consider the statement that Shearer testified Morris made as making it more likely that Morris made a similar comment at the meeting with employees and I find that Morris did make such a comment.

Turning now to the discharges of Spencley and of Wesley, I will take up first the discharge of Spencley. Without doubt, Spencley and several other employees modified their flays Corporation logos on their helmets to read "HaHa" instead of Hays. Also without doubt, this action violated the Respondent's promulgated rules, a copy of which Spencley had received and which he had signed for. Passmore discharged

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Spencley in part for this action on January 23rd, 1998. As noted already, I do not find that Passmore expressed anti-Union sentiments as described in Spencley's testimony. However, there's other evidence of animus in the record which I have already discussed. I will evaluate Spencley's discharge under the framework established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enforced 662 F.2d 889, (1st Circuit 1981) certiorari denied 445 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first make a prima facie showing "sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to take the action which allegedly violated Section 8(a)(3). Once the General Counsel has made such a slowing, the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. If the General Counsel does not present evidence establishing such a prima facie case, the Respondent does not have to demonstrate that it would have taken the adverse employment action anyway.

The General Counsel may establish the prima facie case by Proving the following four elements. One, the alleged discriminatee engaged in Union or protected concerted activities; two, the Respondent knew about such activities; three, the Respondent took an adverse action against the alleged discriminatee; and four, there is a link or nexus between the protected activities and the adverse employment action. I find

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that the General Counsel has established that Spencley engaged in Union protected concerted activities and that the Respondent knew about such activities and that the Respondent took adverse employment action against Spencley. These actions are described in Complaint paragraph 15. Earlier I have described the protected concerted activities which included going to the Union Hall, displaying a Union—Union insignia, speaking out at the employee meeting about working conditions, and also raising the possibility of an OSHA complaint, although it was Wesley who actually filed such a complaint.

Additionally, the timing, as well as the evidence of animus that I've already discussed, established the nexus or necessary link. Therefore, I find that the General Counsel has established

a prima facie case. The burden then shifts to Respondent to show that it would have discharged Spencley regardless of his Union activities. Respondent demonstrates that Spencley did, in fact, violate the work rules about defacing of hard hats and that he also had some attendance violations. However, three employees had defaced their hard hats in similar ways. The Respondent discharged one of them, Spencley. Another employee disappeared resulting in his discharge, but the evidence does not establish that he would have been discharged necessarily had he remained rather than disappeared. The Respondent did not discharge the third employee. This treatment leads me to conclude that

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Respondent has failed to show that it would have discharged Spencley but for his protected activity. Therefore, I find that Respondent has not rebutted the General Counsel's prima facie case with respect to Spencley.

I find—reach a similar conclusion with respect to the earlier warnings which Respondent issued to Spencley. For example, it seems highly unlikely that local management would have disciplined Spencley for being out of his area when it was aware that Spencley was at the time speaking with a corporate level official of the Respondent, safety coordinator, Jerry Boudreaux. That is, it would have been unlikely for Respondent to do so unless Respondent were locking for a way of getting rid—for getting back at an employee it perceived as a trouble maker because of his protected activity. Additionally, I do not find convincing Respondent's defense that part of the disappointment for—part of the reason for disciplining Spencley concerned non-compliance with the early out policy. Applying that there is a failure to establish that such policy was uniformly enforced at the time.

I find the *Wright Line* analysis to the discharge of Wesley—I similarly find that the General Counsel has not established a prima facie case—I'm sorry, I similarly find that the General Counsel has established a prima facie case which the Respondent has not rebutted. In this regard, Wesley's protected activity includes not only Union activity in meeting with the

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Union but also in speaking out about the perceived safety violations or other problems with wash up and eating areas at the jobsite and also his protected activity included actually filing the OSHA, not technically a Complaint, but actually contacting OSHA. I should qualify all of that by stating that although I find the evidence sufficient to show that Respondent was aware of Wesley's protected activity in raising the OSHA and working condition issues, Respondent was not aware at the time it discharged Wesley that Wesley had actually gone ahead and contacted OSHA.

However, I find that Respondent's knowledge of the protected activities that Wesley did engage in apart from contacting OSHA and the evidence of animus which I've already discussed and the timing which I find highly suspicious in this case were sufficient to establish the necessary link or nexus to prove a prima facie case, and I find that counsel has proven a prima facie case in respect to Wesley. I also find that the Respondent has not rebutted the General Counsel's prima facie case with respect to Wesley.

In summary, I find that the discipline and discharge of Spencley and the discharge of Wesley were violative in the manner alleged in the Complaint, and I order Respondent to reinstate them to their same positions or to substantially equivalent positions if their former positions no longer exist and to make them whole with interest for all losses they

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suffered because of the discrimination against them. I shall also order Respondent to post a notice addressing unfair labor practices found herein.

Upon receipt of the transcript of this proceeding, I will issue a certification which, together with the transcript of this bench decision, will be served upon the parties. This certification will also include the Order, Remedy and Notice provisions to address the violations found herein. The time period for an appeal to the Board will begin—upon service of this certification.

It is now 11:05 p.m., and I realize the parties wish this proceeding to conclude this evening, but I do appreciate their patience in waiting the extra amount of time it took while I prepared this decision. I also greatly appreciate and sincerely appreciate the true courtesy and professionalism which both attorneys have consistently demonstrated here.

The hearing is closed.

(Whereupon, the hearing in the above entitled matter was closed at 11:10 p.m. Central Standard Time)